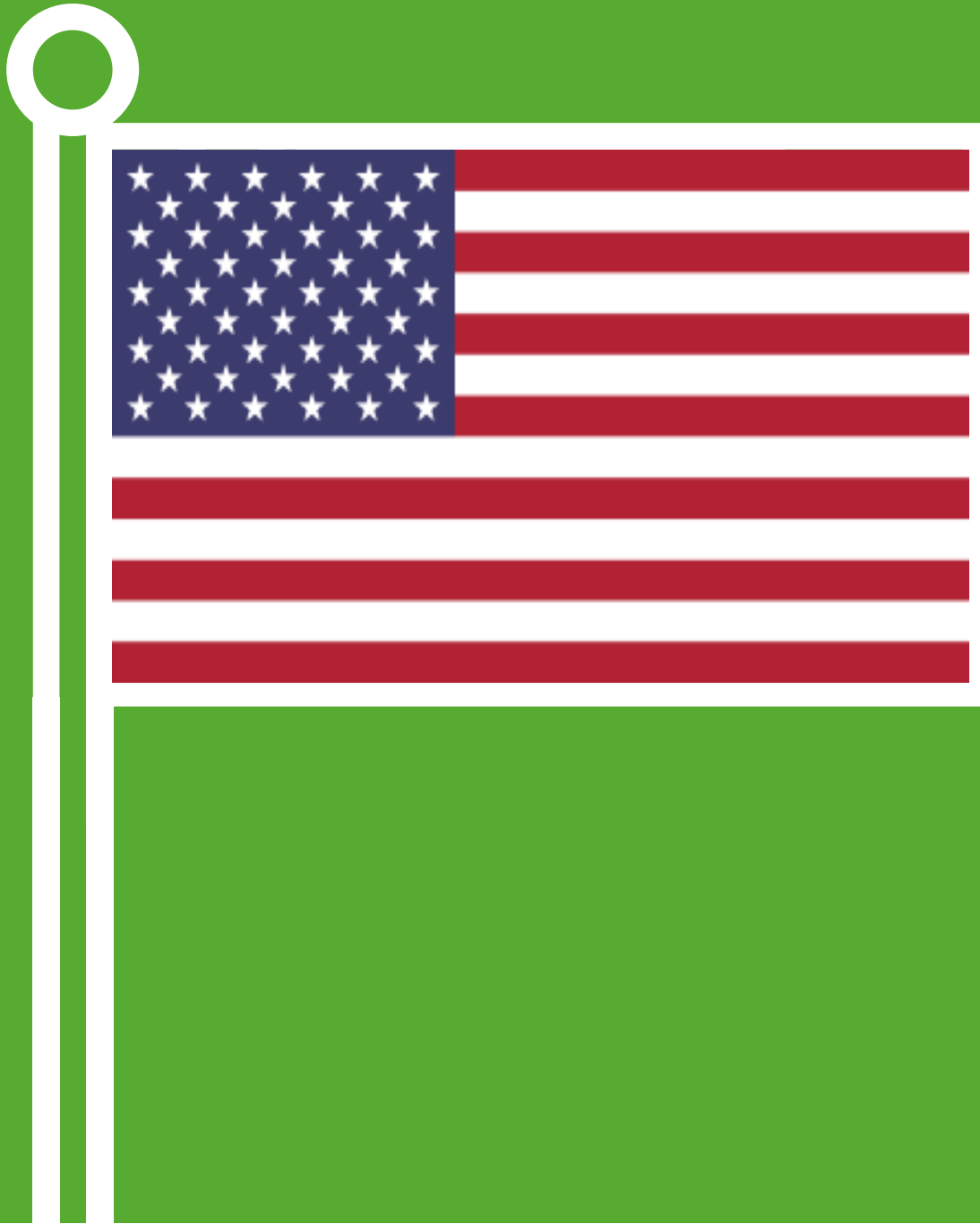


A Practical Guide To Surrogacy In The USA

Produced By Steven H. Snyder, Esq.



UNDERTAKING SURROGACY IN THE UNITED STATES: WHAT YOU SHOULD KNOW

By

Steven H. Snyder, Esq.

Undertaking the process of surrogacy to have a child is a complex medical, legal, financial, and human process in and of itself, but initiating that process across international borders in another country is even more complex. It is important to understand the nature and elements of the process in any country you are considering for your surrogacy journey before selecting your ultimate venue. Here are some things you should know when considering surrogacy abroad generally and surrogacy in the United States specifically.

As chair of the American Bar Association (ABA) Assisted Reproductive Technology (ART) Committee for seven years, I have sat on numerous international professional bodies assessing the efficacy of cross border surrogacy. The critics of surrogacy often point to the financial coercion of poor women into a process against their wills and the lack of informed consent or self-determination that such surrogates have in the process. When you consider a foreign destination for your surrogacy process, perhaps your first consideration may be the ethical nature of the process in that destination.

Surrogacy is and should be a human interaction; it is not hiring a mere "breeder" to carry a pregnancy without an interpersonal connection during the process. It is appropriate to ask and assess whether you can have regular and meaningful communication – an actual relationship - with your surrogate during the process that involves you in the pregnancy and brings you closer together. Other questions that are appropriate include: Are surrogates paid, how much, and do they receive the entire fee without a clinic or intermediary taking a "commission?" Are they required to live in an apartment or dormitory separated for months from their own family? If so, how many are forced to reside together in how much space? Is there a written agreement between you and your surrogate? Is it in her native language? Is she literate so she can read the agreement herself? Does she have the benefit of

a separate and independent legal representative who explains and meaningfully negotiates the written agreement on her behalf? Does she have any individual choice or autonomy in the matter?

In addition to the human elements, it is also important to assess the medical and legal elements. Are the surrogates medically screened to a high standard to insure their physical safety during the pregnancy? Is surrogacy legal in the jurisdiction where the surrogate resides? Is there express law permitting surrogacy, or is it an “informal understanding” that surrogacy can be done that may be subject to restrictive change during your process? What are the birth record and parentage options upon the child’s birth for establishing your parentage? Can you obtain the desired citizenship and obtain a passport or other travel document that allows you to safely travel home with your child in a timely manner? These are just some additional considerations in determining the efficacy of surrogacy in another country. There are others, and all of them should be discussed and considered with the benefit of an experienced professional with direct experience in surrogacy in the destination you are considering.

To safely navigate a surrogacy program in the United States, you will need to enlist the aid of an agency that can match you with a suitable surrogate, a clinic to perform the necessary medical procedures to create the embryo and initiate the pregnancy, and an attorney versed in parentage law to assist you in becoming the legal parents for U.S. purposes after the birth. Upon returning home, you will also need to enlist the services of an attorney in your home country (and any other country for which you may desire citizenship for your resulting child) to establish your child’s parentage and citizenship there. All these entities must work in concert together to make your process safe and successful.

Your first step should be to consult an attorney in your home country to verify that surrogacy is permitted and that you can, indeed, establish your child’s parentage and citizenship when you return home. It will help you plan your process and ask the right questions if you have this information in hand before speaking with the various professionals who will assist you in the U.S.

Your next step is to locate and hire the various professionals you will need to complete your process in the U.S. The questions then become, which professional should you hire first, how do you judge them, and in what order should you hire

them? As for the order in which you hire the various professionals, there is one clear answer here which is that you should NOT hire a U.S. attorney as your starting point. The attorney who will do your U.S. legal work must be licensed in the state the law of which will govern your process, and that law is different in every individual state. The law that will govern your matter will most likely be the law of the state in which your surrogate resides. You will not know that until your agency matches you with a qualified surrogate, so selecting your U.S. attorney should obviously be the last decision you make. Any attorney who suggests that they can assist you in any state is likely a middleman who retains a local attorney in the correct state and adds a mark-up for his or her "services," thereby unnecessarily increasing your already substantial costs. It is far better and more cost effective to retain an attorney directly in the appropriate state at the appropriate point of the process.

So, as between selecting your clinic or your agency first, which is the better choice? This becomes a "chicken or the egg" debate, but I come down on the side of hiring your agency first. The reason I take that position is that your agency is the one central hub of your entire process, and it should guide you through all its complexities, including the selection of your clinic. After all, an experienced agency will have direct working knowledge of multiple U.S. clinics and their processes and patient care standards while you have none. The agency's experiential and practical perspective can be invaluable in finding the best clinic for you. Some agencies do not want you to retain them until you have your embryos created. If you choose such an agency, you will have to assess, implement, and navigate all the clinic selection process and medical procedures alone without supportive guidance. In addition, all reputable agencies generally have a waiting list of prospective parents waiting to be matched, and your place on that list and the timing of your surrogate match are thus unnecessarily delayed. If you select an agency that assists you in interviewing and selecting your clinic, you have their additional expert support as you make decisions during the IVF process, and the timeline for creating your embryos and to matching with your surrogate run concurrently and more efficiently.

The challenge in assessing and selecting your agency first is that there is no current structure for regulating agencies in the U.S. Agencies are the only part of the U.S.

surrogacy process that are largely unregulated. Anyone can start one with no prerequisites for knowledge, experience, or training. There are no enforceable requirements as to what services they must provide or how they manage your money, although there is a voluntary ethical organization, the Society for Ethical Egg Donation and Surrogacy (SEEDS), to which agencies can belong and in which their membership ostensibly indicates the agency complies with that organization's ethical guidelines. Clinics have objective reporting of success rates through the Society for Assisted Reproductive Technology (SART) that are published online (although due to the reporting system they are always two years out of date), whereas agencies have no such reporting system. So how do you select an agency if that is where you wish to start?

First, you will have to make a choice between two general organizational types of agencies. Some agencies are directed by individuals who are not attorneys (lay owners), and others are run by attorneys. Those run by lay owners are limited in the direct services they can provide. They can make referrals to the other professionals necessary to complete the process, but they are limited to recruiting and matching you with your surrogate and certain organizational and administrative services in support of your process. Of necessity, they must refer you out to a separate attorney, a separate insurance expert, and a separate source to escrow your funds and manage financial reimbursement. Thus, you have four largely independent entities coordinating to manage your process together.

Agencies that are run by attorneys can provide all those services in one place if you choose to hire both the agency and the law firm. The agency provides all the expected administrative support while the law firm can provide all your legal services, the assessment, implementation, and enforcement of your insurance options, and the financial management of your process through their highly regulated client trust accounts. In addition, the ethical rules that are not enforceable over an agency (because they do not exist in enforceable form) exist tangentially in such an agency since the attorney is bound by his or her attorney rules of professional conduct, non-compliance with which may result in the attorney's loss of his or her attorney license and ability to practice law. Practically speaking, those rules are then to some degree superimposed on the attorney's activities within the agency.

To be clear, I am not suggesting one of these options is necessarily better than the other. They are simply different. There are highly ethical and successful lay agencies that have been providing caring service to parents for years, as there are attorney-owned agencies. It is just a matter of preference (if you have one), and you should be aware of the differences in assessing your preference.

Once you have considered the general structure of an agency you prefer, obtaining personal referrals, whether from an attorney or other professional in your home country, another reputable surrogacy professional in the U.S., or a past parent who has used the agency's services can be very reassuring. In assessing such referrals, ask and determine whether there is any reciprocal "referral bonus" arrangement between them. That may affect the objectiveness of the referral.

Next, select an agency that has been in existence at least ten years. This gives you reassurance that the agency has successfully completed numerous programs and is more likely viable as a business entity and reliable as an experienced guide in the process. Ask for agency referrals if you do not have any.

Next, make sure your agency protects you financially. At a minimum, any agency should have professional liability insurance to protect you from any agency negligence, a criminal bond in place to protect your funds from theft, cyber insurance to protect the personal and financial information you share with your agency from online theft, and, if directed by an attorney, attorney malpractice insurance. These are simply responsible precautions any agency should have in place if it truly prioritizes your security in the process.

Finally, try to find objective information about the agency, if possible. See if you can determine the professional credentials, training, and experience of the owner(s) of the agency. The more tangential knowledge and experience they have, the more likely they will provide accurate and responsible services. As for an agency's reputation, there are some online resources with rating pages, Facebook groups of past parents/surrogates, and, as referenced above, personal referral sources. Input from any or all these sources will be helpful in assessing an agency's credibility and reputation.

Surrogates in the U.S. are extremely well represented and self-determinative in the process. A personal and human relationship is a natural part of the process.

Compensated surrogacy is legal and morally accepted in virtually all but one state, and citizenship and parentage issues are much more stable and reliable than in other surrogacy destinations. It is, indeed, the most ethical and stable surrogacy process in the world. So why doesn't everyone come to the U.S. for surrogacy? A common reason given is cost. Many people believe surrogacy in the U.S. is simply out of their financial wherewithal.

There are literally hundreds of agencies in the U.S., and they are as diverse in costs and services as the law is among the fifty states. There are many factors that affect cost, and it is possible to put those factors together to create a relatively cost-effective process, even here in the U.S.

The selection of your particular clinic, the scope and type of the IVF process you choose, the clinic's transfer success rates, the election or forbearance of genetic testing, and whether you already have embryos to use that can be transferred from your home country to the U.S. will all affect medical cost. The base agency fee, the various services included in the fee, and whether the agency charges additional fees throughout the process if things do not go smoothly (e.g., a substantial "rematching fee" if you need a new surrogate for any reason) will affect the agency cost, and the surrogate's base fee, insurance status and cost, and potential lost wages will all affect the cost of your surrogate. In my scenario in which you pick your agency first, your agency should help you determine which clinic to hire and what services to engage to stay within your budget. There are agencies that make their prime directive to reduce the cost of the process as much as possible to make it more accessible to more parents. There are surrogates motivated by altruism more than financial gain that offer their services for lower fees. Many of these factors can be geographic. For example, surrogacy is a prevalent process in California, and surrogate fees and related expenses, including maternity insurance options, are much more expensive. The cost of living is also significantly higher there. Choosing an agency/surrogate in the Midwest or other part of the U.S. will naturally reduce your costs because of those factors. There is a way to find an ethical, cost effective surrogacy process that you can afford in the U.S. You just need proper guidance.

Another reason some offer for not coming to the U.S. for surrogacy is the timeline for completing the process. Again, timeline is affected by the agency you choose,

their flow and backlog of parents waiting to be matched, the rate at which they recruit and qualify surrogates, and the many, many uncontrollable aspects of surrogacy (e.g., failed transfers, miscarriages, etc.). There are agencies that vary in both quality and timeline, but, again, there are varied and multiple options depending on your agency and its location. It is possible to create efficient timing for your process as well, particularly since compensated surrogacy is legal in the U.S., so there is not the significant wait for rare altruistic surrogates which is experienced routinely in Canada.

All in all, the U.S. is an ethical and stable destination for surrogacy. With the right advice and direction of an experienced and caring professional who is determined to represent your best interests and not his or her own, you can afford to have a child in the U.S., as to all of ethics, cost, and time.

Feel free to contact me for further education/guidance if you would like.

steve@snyderlawfirm.com